Supreme Court, U. S.
FILED
MAR 17 1975
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1974

No. 74-5116

JACK ROLAND MURPHY,

Petitioner,

v.

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

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OPINIONS BELOW

Petitioner's direct appeal following conviction was to the District Court of Florida, Third District. The opinion of that court is reported at 252 So.2d 385 (Fla. 3rd DCA, 1971).

Petitioner's petition for the writ of habeas corpus was denied by the United States District Court for the Southern District of Florida. The opinion is reported at 363 F.Supp. 1224 (S.D. Fla., 1973).

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 495 F.2d 353 (5th Cir., 1974).

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit were entered on June 10, 1974. (App. 51.) The petition for a rehearing by the Court en banc was denied July 12, 1974. (App. 59.)

The Petition for a Writ of Certiorari and Motion to Proceed in Forma Pauperis were docketed August 12, 1974, and granted December 23, 1974. Petitioner's brief in final form was filed February 19, 1975.

The jurisdiction of this Court is invoked under Title 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

I

WHETHER THE PETITIONER WAS DENIED A FUNDAMENTALLY FAIR TRIAL AS PRESCRIBED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHEN THE TRIAL COURT FAILED TO DISMISS FOR CAUSE THOSE JURORS WHO KNEW THAT PETITIONER WAS A CONVICTED FELON?

II

WHETHER THE PETITIONER WAS DENIED A FUNDAMENTALLY FAIR TRIAL AS PRESCRIBED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHEN THE TRIAL COURT DENIED HIS MOTION FOR CHANGE OF VENUE BASED UPON ALLEGEDLY PREJUDICIAL PRETRIAL PUBLICITY?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States: nor shall any State deprive any person of life, liberty, or property, without due process of law. . .

Article I, Section 16 of the Constitution of the State of Florida provides in pertinent part as follows:

> SECTION 16. Rights of accused.-- In all criminal prosecutions the accused shall. . .have a speedy and public trial by impartial jury in the county where the crime was committed.

STATEMENT

The petitioner in this Court was the defendant in the trial court. The respondent, the State of Florida, was the prosecution. On petition for the writ of habeas corpus the defendant was the petitioner and the State of Florida the respondent. For purposes of clarity, the parties respectively will be referred to as petitioner and respondent.

On January 28, 1968, the home of a Miami Beach resident, Olive Wofford, was robbed. The petitioner, Jack Murphy, was apprehended as he and three others fled from the scene.

His arrest drew a flurry of attention from the press as the petitioner had previously drawn national attention upon himself as one of the perpetrators of the theft of the "Star of India" sapphire from the New York Museum of Natural History in 1964. However, in May of 1968, before he could be brought to trial for the Wofford robbery, petitioner was arrested and indicted in neighboring Broward County on two charges of murder, popularly known as the "Whiskey Creek Murders". On March 1, 1969, petitioner was found guilty of one of these murders.

In the interim, the Wofford charges had been nolle prossed after petitioner had been ruled incompetent to stand trial and Broward County prosecutors desired to commence the murder trial in that county. On August 14, 1968, petitioner was indicted by a Jederal grand jury for conspiring to

transport stolen securities in interstate commerce. He pleaded guilty to one count of this indictment in December.

Thereafter, the Dade County prosecutors refiled the Wofford robbery charges. In July of 1970, pretrial proceedings were begun. Petitioner moved for a change of venue based upon allegedly prejudicial pretrial publicity. The trial court did not rule on this motion at that time but deferred ruling until after the voir dire of the jury panel. Seventy-eight jurors were questioned. Of these, twenty were excused peremptorily, twelve by the petitioner and eight by the prosecution. Twenty-seven were excused for medical, family, or economic reasons. Twenty veniremen were excused because they had formed an opinion that the petitioner was guilty and could not give him a fair trial. Three were excused for miscellaneous reasons. The resulting jury consisted of six regular jurors and two alternates. Thereafter the motion for change of venue was argued before the court, and was denied. Prior to trial the court also conducted a competency hearing on the defendant's plea of insanity, resulting in the ruling that he was competent to stand trial.

At trial the petitioner did not take the stand in his own behalf and offered no evidence. Moreover, he declined to cross-examine any of the prosecution's witnesses announcing after direct examination of each witness that the defendant did not accept the jury panel and declined to question the witness.

The petitioner was found to be guilty by the jury of breaking and entering a dwelling with intent to commit robbery being then and there armed and/or assaulting persons therein. He was also found guilty of assault with the intent to commit robbery. He was adjudicated guilty by the court on both counts and sentenced to serve a term of life imprisonment for the crime of breaking and entering and to serve a consecutive term of twenty years for the crime of assault.

Petitioner's objections to his trial jury and to the venue in which trial was held were raised on direct appeal in the state courts and in his petition for the writ of habeas corpus in the appropriate federal district court. On appeal therefrom to the United States Court of Appeals for the Fifth Circuit it was held that neither the failure to grant petitioner's motion for change of venue predicated on pretrial publicity, nor the denial of challenges for cause of those jurors who knew petitioner was a convicted felon, constituted error of constitutional proportions and therefore presented no grounds for the issuance of a writ of habeas corpus.

SUMMARY OF THE ARGUMENT

A. The petitioner was not subject to the impairment of any rights guaranteed by the Constitution of the United States during the course of his Florida prosecution. The findings of the two federal habeas corpus courts below are amply supported by the record in this regard. Years before, starting with the

nationally publicized "Star of India" jewel theft, the petitioner had begun to call attention to himself through his criminal exploits. As a result his Florida prosecutions, both state and federal, in 1968 and 1969 for a variety of crimes attracted widespread news media attention prior to the trial of the instant case. Nevertheless, it is crucial to proper disposition of petitioner's claims that this publicity was factual rather than inflammatory, discussed matters of public record, and was declining in intensity prior to trial of the case at bar.

Petitioner contends the trial judge violated his due process rights in failing to excuse for cause those jurors who from the above publicity had learned of petitioner's felony convictions, relying upon Marshall v. United States, 360 U.S. 310 (1959) and United States ex rel. Doggett v. Yeager, 472 F.2d 229 (3rd Cir. 1973). Marshall is not precedent here. Decided solely as an aspect of this Court's supervisory power, it comes not even close to suggesting due process violations. Lower courts other than the Doggett court have viewed Marshall as properly applied only to federal trials. In state prosecutions the totality of the circumstances test of Irvin v. Dowd, 366 U.S. 717 (1961) sets the proper standard. The Third Circuit itself has subsequently declined to follow Doggett and Marshall in a later case where publicity was neither inherently inflammatory nor the circumstances of the case egregiously prejudicial. United States v. D'Andrea, 495 F.2d 1170 (1974). In such cases the declarations of the jurors as to their impartiality must be dispositive unless petitioner surmounts the burden of showing actual prejudice to him from trial before the jury.

B. For Corresponding reasons the petitioner was not denied due process when the trial court denied his motion for change of venue. Such change is not to be reflexively granted upon a showing of widespread pretrial publicity, but again requires a certain burden be borne by the defendant. It must be shown that the publicity is inflammatory and likely to arouse the community's passion against the accused. The petitioner here has fallen far short of that test. This is especially true in light of the jurors' own protestations of impartiality on an intensive in-camera voir dire, supported by a record demonstrating the factual nature of said publicity. It has been held sufficient by this Court that the jurors can lay aside impressions or opinions and render a verdict based on the evidence presented in Court. Irvin v. Dowd, supra. The trial court was eminently correct in deferring ruling on the change of venue motion until after voir dire, which conclusively demonstrated that such change was unnecessary. Additionally, the distinction is between cases in which the nature of the attention by, and conduct of, the press involve such a probability of prejudice that no nexus need be shown between community prejudice and jury prejudice, and cases in which news coverage is neither accusatory nor vindictive. In the latter class of cases no bitterness or prejudice is created in the community and the accused must demonstrate a necessity for change of venue on voir dire examination. If the pretrial

publicity were intensive or extensive or the examination of the entire panel revealed widespread prejudice against the defendant, the Court could, as a matter of law, disregard the jurors' estimation of themselves. Beck v. Washington, 369 U.S. 541 (1962). In the instant case, it could not. Finally, where proof of the crime is overwhelming, any doubt as to the validity of the trial court's ruling must be governed by the test of harmless error.

ARGUMENT

I

THE PETITIONER WAS NOT DENIED A FUNDAMENTALLY FAIR TRIAL AS PRESCRIBED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHEN THE TRIAL COURT FAILED TO DISMISS FOR CAUSE THOSE JURORS WHO KNEW THAT PETITIONER WAS A CONVICTED FELON.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution guarantees a criminal defendant, accused by one of the States, the right to a fundamentally fair trial by a panel of impartial, indifferent jurors. Irvin v. Dowd, 366 U.S. 717 (1961). The Florida Constitution provides the essential protection that "In all criminal prosecutions the accused shall . . .have a speedy and public trial by impartial jury in the county where the crime was committed." Constitution of the State of Florida, Article I, Section 16 (1968). Florida's application of this State constitutional standard governs unless in construction thereof Fourteenth Amendment Due Process has not been satisfied. Pamplin v. Mason, 364 F.2d 1, 3 (5th Cir. 1966).

A. Review Of A Petition For the Writ Of Habeas Corpus Is Governed Not By The Broad Exercise Of Supervisory Power But The Narrow One Of Due Process.

In challenging the validity of the conviction by virtue of which he is incarcerated, the petitioner bears a double burden of proof: first, that the alleged error was of constitutional magnitude, 28 U.S.C § 2254(a); Milton v. Wainwright, 407 U.S. 371, 377 (1972), and in addition that the alleged error contributed to the verdict of guilt. Peters v. Kiff, 407 U.S. 505, 508 (1972), dissenting opinion of Mr. Chief Justice Burger. Moreover, where the issue raised on habeas corpus is resolved with findings of fact in the state courts, the state court's determination made on the merits of the factual issue is presumptively correct. 28 U.S.C. § 2254(d), (d)(1). The burden is then the petitioner's to establish "by convincing evidence that the factual determination by the State court was erroneous." LaValle v. Delle Rose, 410 U.S. 690 (1973). The findings in the case at bar bear particular mention. The District Court of Appeal of Florida, Third District, is the court of direct review for Dade County's criminal trial courts.[1] On September 21, 1971, that court held, among other points, that the trial judge did not abuse his discretion in failing to grant a change of venue or in refusing to excuse for cause each member of the jury panel. Murphy v. State, 252 So.2d 385 (Fla. 3rd DCA, 1971).

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[1]Constitution of the State of Florida, Article V, Section 4.

The motion for change of venue, and in part the challenge of jurors for cause, was based upon exhibits of news media reports attached to the motion for change of venue. With reference to both these questions the court ruled adversely to the petitioner because it found that the news media publicity, of which the defendant complained, consisted for the most part of factual accounts. It further found that there was no demonstration "or argument" that the reports were highly colored or inflammatory. That finding was confirmed by both federal courts below. Murphy v. State, 363 F.Supp. 1224 (S.D. Fla., 1973), affd. 495 F.2d 553 (5th Cir., 1974).

Petitioner contends the jury's exposure to publicity making reference to his prior criminal convictions was in itself adequate cause for challenge regardless of the nature of the publicity or the juror's own assurances of impartiality.[2] In support thereof he relies upon Marshall v. United States, 360 U.S. 310 (1959). Nevertheless, Marshall is of doubtful precedential value in the case of a state defendant petitioning for federal habeas corpus.

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[2]The right of accurate publication of public prosecutions and other matters of public record, such as convictions, cannot be abridged. See Cox Broadcasting Corp. v. Cohn, __ U.S. __ No. 73-938 (decided March 3, 1975). Once such right is exercised by the press the question is whether the trial court has taken such measures as will guarantee the defendant due process.

Decided solely as an aspect of this Court's supervisory power over federal criminal prosecutions, the case was not decided on constitutional grounds; it therefore presents no standard for review of state cases. Moreover, the overwhelming majority of courts to consider the "Marshall issue" have held that it does not rise to a constitutional level.

As stated by the court below, ". . .the situation in Marshall is factually similar to the instant case. . ." Marshall was tried and convicted for unlawfully dispensing a drug controlled by federal law. During the trial two newspapers were seen by members of the jury stating that Marshall's wife had been convicted on "drug charges" and that the defendant himself had a record of prior felony convictions.

The trial judge, upon discovery of the foregoing, inquired of the jurors individually. Each of the jurors told the judge that he would not be influenced by the news articles, that he could decide the case only on the evidence presented, and that he felt no prejudice against the defendant as a result of the news articles. The trial judge denied defendant's motion for mistrial, and the Court of Appeals affirmed. This Court reversed.

Nevertheless, Marshall makes difficult precedent for the instant case. The first blush resemblance between the cases must nevertheless be tempered by their basic differences. First, petitioner Murphy complains of publicity, as evidenced by

the news clippings and television releases of record, occurring a substantial lenght of time prior to trial. This Court's decision in Marshall involved newspaper articles published during the trial itself. It is submitted that there is an inherent difference between news media material concerning the trial and reaching the jurors then in the process of receiving the evidence of that very trial, and pre-trial publicity covering a time span between a year and a half and three and a half years prior to trial.

Secondly, petitioner here seeks a writ of habeas corpus, available to him only upon a showing of constitutional error, while this Court's position in Marshall was carefully drawn solely in the exercise of its supervisory power to formulate and apply proper standards for enforcement of the criminal law in the federal courts. With the exception of the intimations of the United States Court of Appeals for the Third Circuit in United States ex rel. Dogget v. Yeager, 472 F.2d 329 (1973), no court has viewed the effects of Marshall as extending beyond the federal trial courts.

In Pacheco v. Hocker, 295 F.Supp. 829 (D. Nev. 1968), aff'd 406 F.2d 1031 (5th Cir. 1969) cert. den. 396 U.S. 1043 (1970). Pacheco, a state prisoner, petitioned for a writ of habeas corpus alleging, inter alia that he did not receive a fair trial as guaranteed by the due process clause of the Fourteenth Amendment in that some of the jurors admitted reading newspaper articles during

the trial concerning his codefendant's plea of guilty to similar charges and the defendant's own former convictions for two felonies. On voir dire of the jurors by the court five jurors and one alternate admitted having read the article, although each replied in the affirmative to the court's questioning as to whether they could still give the defendant a fair and impartial trial and set aside anything contained in the article. Defendant's motions for mistrial were denied and Pacheco's subsequent conviction was affirmed on appeal to the highest court of that state, one judge dissenting.

In due course the state prisoner then exercised his right to review his custody for constitutional infirmity by petitioning for a writ of habeas corpus in the appropriate federal district court, raising the same questions as does Petitioner Murphy. The District Court phrased the issues as follows:

> We are faced with an ever-recurring problem which, for us, is posed by the following questions:
>
> Are prejudicial error and lack of Fourteenth Amendment due process, in the context of the Sixth Amendment right to a fair trial, synonymous? If a Federal Judge, sitting on the Supreme Court of Nevada, would have joined in the dissenting opinion rather than the majority opinion of that

> Court on direct review of the conviction, should that Judge ipse dixit declare a violation of federal constitutional rights on a petition for habeas corpus? Are principles announced by the Supreme Court of the United States, in exercise of its supervisory power over federal court trials (Cf. Marshall v. United States, 360 U.S. 310, 79 S.Ct. 1171, 3 L.Ed.2d 1250), conclusive in application of the due process--fair trial requirements to the state courts? The proper answer to each of these questions is "No." Hilliard v. Arizona, 9th Cir. 1066, 362 F.2d 908; Wolfe v. Nash, 8th Cir. 1963, 313 F.2d 393.
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> Id. at 832.

That court, relying on the same factors controlling the instant case, held that even the most sensitive jurist could find no denial of due process in the refusal of a new trial. Those factors were: 1) Each juror who read the offending newspaper articles on examination by the court and defense counsel affirmed his ability to set the information aside and accord the defendant a fair trial. 2) The jurors affirmations were accompanied by such indicia of reliability as their individual statements such as, "As I see it we are trying him for one thing and it has nothing to do with anything else," and "certainly, that had nothing to do with what he is being tried for."

3) The evidence adduced overwhelmingly established the defendant's guilt. The very same factors formed the basis for denying the instant petitioner relief in those lower courts which have reviewed the cause sub judice and have consistently found petitioner's contentions wanting in merit.

This judicial confinement of Marshall v. United States, supra, to cases tried in the federal trial courts is the nearly universal view of both federal and state courts[3] which have rendered opinions on the present issue. Habeas corpus review of state criminal

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[3]The state criminal courts have refused to unseat jurors solely because they possessed some knowledge of the accused which would have been inadmissible as evidence at trial. Instead they have reviewed the totality of the circumstances, most frequently being guided by this Court's treatment of the issue in Irvin v. Dowd. State v. Collins, 150 N.W.2d 850 (Minn., 1967); Peters v. Commonwealth, 505 S.W.2d 764 (Ky. App., 1974); State v. Heard, 268 So.2d 629 (La., 1972); State v. Jarrette, 202 S.E.2d 721 (N.C., 1974); State v. Beason, 506 P.2d 1340, 1348 (Idaho, 1973); Greenfield v. Commonwealth, 204 S.Ed.2d 419, 420 (Va., 1974); Mathis v. State, 296 So.2d 764, 766 (Ala., 1974); Smith v. State, 327 S.W.2d 308 (Tenn., 1959); People v. Frogge, 75 Cal.Rptr. 517 (5th DCA, 1969); Commonwealth v. Pierce, 303 A.2d 209 (Pa., 1973); Reil v. Commonwealth, 171 S.E.2d 162 (Va., 1969); State v.Odum, 369 S.W.2d 173, 181 (1963).

trials is not limited merely to the single question of whether jurors learned of the defendant's otherwise inadmissible criminal history, but entails a review of the totality of the trial, each case being decided on its own facts. Irvin v. Dowd, 366 U.S. 717, 728 (1961). Thus, in United States v. Smith, 306 F.2d 596 (2d Cir., 1962), the Court of Appeals reversed the grant of habeas corpus relief to a state prisoner, holding the standard imposed by Marshall to be more stringent than the due process requirement that the defendant be afforded a fair trial by a panel of indifferent jurors.

> . . .if this had been a federal trial and jurors had admitted to reading contemporaneous reports of a defendant's criminal record, our supervisory power over the administration of federal justice would compel us to reverse. Marshall v. United States, 360 U.S. 310, 79 S.Ct. 1171, 3 L.Ed. 2d 1250 (1959). But the mere possibility that such information, made public three months prior to trial, might have remained in the minds of one or more of those who eventually became jurors in the case is not in itself sufficient to raise a constitutional infirmity in Brown's conviction under the due process clause of the Fourteenth Amendment.
>
> Id. at 603.

B. The Instant Case Lacks Circumstances So Egregious That The May Be Deemed Inherently Prejudicial. This Case Must Be Governed By the General Rule That The Burden Of Demonstrating Prejudice Is On The Challenger.

Petitioner's challenge is in essence, the question of whether the trial court's handling of jury selection rendered Murphy's "trial so unfair as to amount to a taking of" his "liberty without due process of law." Fay v. New York, 332 U.S. 261, 296 (1947). The majority of the Court in Fay was careful to point out, in developing this issue, that while the Supreme Court of the United States has a supervisory power over federal judicial proceedings, there is a "duty of deference to the authority of the State over local administration of justice." See United States ex rel. Darcy v. Handy, 224 F.2d 504 (3rd Cir., 1955) affd. 351 U.S. 454 (1956). The necessary corollary of this doctrine is that a habeas corpus petitioner, as in most forms of collateral attack, must assume and sustain the burden of proving some identifiable prejudice in order to show that his jury was prejudiced. Stroble v. California, 343 U.S. 181 (1952); Beck v. Washington, supra; Irvin v. Dowd, supra. As stated by this Court in Irvin:

> In these days of swift, widespread and diverse methods of communication an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. * * *To hold that the mere exertence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court. At p. 722-723, at p. 1642 of 81 S.Ct.

Following the dictates of this Court in Irvin v. Dowd, lower federal courts have refused writs of habeas corpus where petitioners have been able to demonstrate at most the possibility of prejudice. Mares v. United States, 383 F.2d 811 (10th Cir. 1967); Latham v. Crouse, 330 F.2d 865, 868 (10th Cir., 1956), cert. den. 379 U.S. 866 (1964). Most frequently, the controlling consideration has been a voir dire of the jurors which satisfies the Irvin v. Dowd requirements. Mares, supra.

In United States ex rel. Parson v. Anderson, 354 F.Supp. 1060 (D. Del. 1972), affd 481 F.2d 94 (3rd Cir. 1973), a state prisoner challenged the fairness of his trial on allegations similar to those presented here. Parson was brought to trial for the crime of murder in the course of attempting to perpetrate rape. As in the present case, the task of jury selection was a considerable one. It consumed nine and one half trial days, and some 1,582 pages of transcript. Fifty-four veniremen were excused for reasons apart from community prejudice related matters. One hundred twenty-eight were discharged for cause as a result of their having formed opinions as to the defendant's guilt. By way of comparison to the instant case, jury selection lasted fifteen days, also requiring approximately 1500 transcribed pages to report, although only seventy-eight jurors were called. Of those thirty were excused by the court for unrelated reasons and only twenty were excused because they might have formed an opinion as to the defendant's guilt. (The remaining jurors were peremptorily excused, leaving a jury of six and two alternates.)

Parson contended he was denied his constitutional right to an impartial jury. Admitting that the court was confronted with a difficult task, it recognized that this was ". . .one of those situations where the Supreme Court has recognized it is impossible to find jurors 'totally ignorant of the facts and issues involved'" citing to Irvin v. Dowd, supra, at 722. In ultimately ruling the court, however, was careful to focus on the jurymen seated as opposed to the one hundred

ninety-seven who were questioned. See Gordon v. United States, 438 F.2d 858 (5th Cir. 1971), analyzing those cases in which reversal of convictions without a showing of jury prejudice is confined to "extreme cases" of "inherently prejudicial publicity" which "saturated the community." For cases failing to qualify as such, the Fifth Circuit stated ". . .we are in accord with the view that where publicity prior to and during a trial is neither inherently prejudicial nor unusually extensive, the accused must assume the traditional burden and show actual jury prejudice." (Footnotes omitted.)

C. The Petitioner Was Not Denied A Fundamentally Fair Trial Because Some Member Of His Jury Had Knowledge Of His Prior Criminal Violations.

It is not a per se constitutional infringement for the jury to know of a defendant's prior crimes. Spencer v. Texas, 385 U.S. 554, 560 (1967). Conversely, not every trial error or infirmity which might call for the application of supervisory power also constitutes a "failure to observe that fundamental fairness essential to the very concept of justice." Donnelly v. DeChristoforo, __ U.S. __, 94 S.Ct. 1868, 1871 (1974), quoting Lisenba v. California, 314 U.S. 219, 236 (1941). The fundamental and historic distinc-

tion between standards required by due process of law and those established by this Court in the exercise of supervisory power was discussed at greater length in McNabb v. United States, 318 U.S. 332, 340-341 (1943):

> In the view we take of the case, however, it becomes unnecessary to reach the Constitutional issue pressed upon us. For, while the power of this Court to undo convictions in state courts is limited to the enforcement of those "fundamental principles of liberty and justice", Hebert v. Louisiana, 272 U.S. 312, 316, 47 S.Ct. 103, 104, 71 L.Ed. 270, 48 A.L.R. 1102, which are secured by the Fourteenth Amendment, the scope of court reviewing power over convictions brought here from the federal courts is not confined to ascertainment of Constitutional validity. Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized as "due process of law" and below which we reach what is really trial by force. Moreover, review by this Court of state action expressing its notion of what will best further

> its own security in the administration of criminal justice demands appropriate respect for the deliberative judgment of a state in so basic an exercise of its jurisdiction. Considerations of large policy in making the necessary accomodations in our federal system are wholly irrelevant to the formulation and application of proper standards for the enforcement of the federal criminal law in the federal courts.

See Rideau v. Louisiana, supra, Mr. Justice Clark dissenting 373 U.S. at 729. Marshall v. United States must be so viewed in its relation to the case sub judice.

Marshall has not been construed by the federal courts to extend beyond its expressly stated scope of supervisory power over the federal trial courts. Petitioner contends the United States Court of Appeals for the Third Circuit has now so held in United States ex rel. Doggett v. Yeager, 472 F.2d 229 (1973) and that circuit's reading of developing case law. In Doggett the defendant, accused of bank robbery, was tried in a small, rural community amid considerable newspaper publicity. The publicity concerned Dogget's alleged pretrial escape attempt and his change of plea from one of "guilty" to one of "not guilty". Thus, and it is important to note, the publicity concerned two independent circumstances which the jury could construe as

an admission of guilt of the very crime charged. The trial court questioned the jury en banc with the intent of determining prejudice from the articles. Four had heard about or read one of the articles during the trial. Nevertheless the judge rejected a joint suggestion by defense and prosecution that he inquire of the jurors whether there had been any discussion among themselves about one particular article. The court had earlier admonished the jury not to read anything about the case, and the order was apparently disregarded. Similarly, the judge refused to question the jurors later during the trial when defense counsel again reported to the court that the jury may have been exposed to another prejudicial newspaper article. In addition, and in sharp contrast to the instant case, the evidence of guilt was far from "overwhelming". The defendant was not apprehended near the scene, spatially or temporally; moreover, the loot was not recovered. Thus, the court was compelled to state 'We cannot hold that information about an escape attempt could not have influenced the verdict certainly we cannot so hold beyond a reasonable doubt. (Citations omitted.) 472 F.2d at 236. On the foregoing facts the Third Circuit held that the substantial likelihood of the newspaper articles, concerning the attempted escape and the retracted guilty plea, coming before the jury was sufficient in itself without requiring the defendant additionally to show actual prejudice from the publicity. The court codified its view of the case law as resulting in the rules that 1) if the defendant has shown the likelihood that seriously prejudicial materials may have reached the jury, due

process requires some form of relief, and 2) that a juror's statement that the adverse publicity will not influence him does not automatically qualify him as impartial. 472 F.2d at 239.

As a result, the petitioner seeks to impose the absolute rule that the suggestion of prejudice is by itself sufficient to warrant a new trial without the defendant having to show actual prejudice. That the Doggett holding may have been more a result of its own particular facts, than it was an announcement of a clear rule by that circuit is evident from that very same court's opinion in United States v. D'Andrea, 495 F.2d 1170 (1974). There, in affirming the trial court's denial of a mistrial based on the jury's exposure to a newspaper article reporting the defendant's indictment on another charge, and referring to the defendant as a "gang figure" and a "reputed underworld figure" the court relied heavily on the juror's own assurances, the trial judge's instructions, and the same analysis of this Court's prior opinions as is submitted by respondent in this brief.

> In some cases, the publicity that occurs is so fundamentally prejudicial that actual prejudice is presumed as a matter of law. In these cases, the mere occurrence of the event requires declaration of a mistrial. See, e.g., Turner v. Louisiana, 379 U.S. 466, 85 S.Ct. 546, 13 L.Ed.2d 424 (1965) (two key prosecution witnesses acting as attendants for the jurors throughout the trial) Rideau v. Louisiana, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed. 2d 633 (1963) (motion picture of defendant "confessing" to the sheriff shown on local television).

Where the improper publicity is of less serious nature however, no similar presumption operates. In these cases, the appellate court (like the district court) must review the circumstances surrounding the exposure of the jury to the publicity and order a new trial only when substantial prejudice has occurred. See United States ex rel. Doggett v. Yeager, 472 F.2d 229, 239 (3d Cir. 1973); Marshall v. United States, 360 U.S. 310, 312, 79 S.Ct. 1171, 3 L.Ed.2d 1250 (1959). A comparison of the facts of this case to the facts of Turner, Rideau, and the cases which follow their approach make it clear that this case falls in this latter category; that is, substantial prejudice must be shown.

495 F.2d 1170 at 1172 fn. 5

II

THE PETITIONER WAS NOT DENIED A FUNDAMENTALLY FAIR TRIAL AS PRESCRIBED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHEN THE TRIAL COURT DENIED HIS MOTION FOR CHANGE OF VENUE BASED UPON ALLEGEDLY PREJUDICIAL PRETRIAL PUBLICITY.

A. The Burden Of Proof Rests With Petitioner To Show Facts Upon Which Prejudice Can Be Demonstrated.

In order for a defendant to be successful in his attempt to change venue, it is necessary for him to show that because of the pretrial publicity, there is such a feeling of prejudice and bias against him in the community where he is to be tried that his right to obtain a fair and impartial trial is jeopardized.

In considering the defendant's motion for a change of venue based on pretrial publicity the court must not be "concerned with the fact of publicity but with the assessment of its nature." Silverthorne v. United States, 400 F.2d 627, 631 (9th Cir. 1968) cert. den. 400 U.S. 1022 (1971). The existence of widespread publicity does not by itself support a change of venue. Beck v. Washington, 369 U.S. 541 (1962). The publicity must be inflammatory and likely to arouse the community's passion against the particular defendant. Sheppard v. Maxwell, 384 U.S. 33 (1966); Estes v. Texas, 381 U.S. 532 (1965); Rideau v. Louisiana, 373 U.S. 717 (1963); Irvin v. Dowd, 366 U.S. 717 (1961) (hereinafter sometimes referred to as Sheppard, Estes, Rideau and Irvin). The respondent respectfully submits that the publicity surrounding petitioner's trial, in the instant case, does not meet this standard. The in-camera voir dire which encompassed close to 1500 pages of the record on appeal demonstrates a successful

attempt in eliminating veniremen who might possibly have been contaminated against the petitioner by the pretrial publicity.[4] However, petitioner asserts that notwithstanding the jurors' assurances of fairness, their knowledge of petitioner's previous convictions and their exposure to publicity necessarily belies their candid expressions of impartiality. (Brief of Petitioner at 16, 21.) Such an assertion finds no support in previous decisions of this court. It is only when the publicity is virulent Rideau, or consistently states that the defendant is guilty, Irvin, or creates a carnival atmosphere Sheppard, that it would be possible to assume that veniremen might be unable to respond candidly to the voir dire

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[4]The term "pretrial" publicity will be used throughout the brief. It should be noted, however, that this phrase is to be interpreted in light of the following facts: The dates on the great majority of newspaper clippings, offered by petitioner, show them to have been published between December 15, 1967 and January 24, 1969. Jury selection in the case at bar began July 27, 1970, more than one and a half years after the "widespread" publicity. This crucial factor will be developed further in the brief.

interrogation.[5] The seven federal and state judges who have had occassion to review the record have all affirmed the trial court's implicit determination that neither bitter feelings of virulence nor a carnival atmosphere existed in Dade County.[6] The law is well-established that "[t]he finding of the trial court upon that opinion ought not be set aside by a reviewing court, unless the error is manifest." Reynolds v. United States, 98 U.S. 145, 156 (1878).

To prevail, petitioner assumes a double presumption--that the publicity surrounding the instant case was prejudicial rather than factual and that the six (6) jurors on his jury had read or seen these accounts and were thereby influenced in their deliberations. The burden of proof thus falls

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[5]In its examination of the record the District Court found that "[a]fter careful consideration of the record, the Court concludes that no widespread prejudice against petitioner was harbored by the jury panel. Furthermore, the publicity of which petitioner complains was, as the State appellate court found, largely factual, rather than inflammatory in nature." Murphy v. Florida, 363 F.Supp. 1224, 1228 (S.D. Fla. 1973) aff'd 495 F.2d 553 (5th Cir. 1974).

[6]Murphy v. State, 252 So.2d 385 (Fla. App. 1971); Murphy v. Florida, 363 F.Supp. 1224 (S.D. Fla. 1973) (App. 40) aff'd 495 F.2d 553 (5th Cir. 1974) (App. 51).

squarely upon the shoulders of petitioner to show that his conviction was a result of "essential unfairness. . .not as a matter of speculation but as a demonstrable reality." Adams v. United States ex rel. McCann, 317 U.S. 269, 281 (1942). Under the following factual analysis, respondent submits petitioner has manifestly failed to meet this standard.

B. The Petitioner's Conviction Must Stand Unless Prejudice Is Shown By Expressions On The Part Of The Overwhelming Majority Of The Persons Questioned On Voir Dire, As Well As By A Substantial Proportion Of The Jurors Actually Empaneled.

The evolution of mass communication, from the handbills of the 1700's to the telecommunication satellites of today has been paralleled by a line of cases from this Court emphasizing the procedural and substantive safeguards necessary to assure fair criminal trials before impartial jurors.

In 1807 the treason trial of former Vice President of the United States, Aaron Burr, set the stage for the first judicial discussion of a criminal defendant's constitutional right to be tried by an impartial jury. Chief Justice John Marshall, presiding at the trial, ruled that the Constitution demanded that a criminal jury must be free "from those strong and deep impressions which close the mind against the testimony that may be offered in opposition to them." Burr's Trial, 8 U.S. (4 Cranch) 455 (1807) and that the verdict must be based solely upon the evidence presented in court. The Chief Justice, however, distinguished "deep impressions " from "light

impressions" and held that the latter may be presumed capable of yielding to evidence, and therefore, not capable of rendering the jury partial.

In 1878 Reynolds v. United States, presented the "partial juror" problem to this Court for the first time on appeal. Expanding Mr. Justice Marshall's distinction between "deep" and "light" impressions, Reynolds held that a partial juror is not necessarily one who has formed an opinion, since it is virtually impossible to find one who has not heard or read of a notable crime, but rather the defendant must show "the actual existence of such an opinion in the mind of a juror as will raise the presumption of partiality." Reynolds v. United States, supra at 157. The question of how an appellate court was to determine this partiality left the important questions unanswered.

Although Justice Jackson, joined by Justice Frankfurter, had concurred in the reversal of the convictions on "trial by newspaper" grounds in Shepherd v. Florida, 341 U.S. 50 (1951) and Justice Frankfurter had dissented on the same grounds in Stroble v. California, 343 U.S. 181 (1952), Irvin v. Dowd, 366 U.S. 717 (1961), marked the first time this Court struck down a state conviction solely on the ground of prejudicial publicity. This Court, in Irvin clarified the extent of impartiality required under the Fourteenth Amendment Due Process Clause. It would appear from the holding in Irvin v. Dowd, supra, that in addition to extreme and intense adverse publicity, deep seated and bitter prejudice must be shown from the tes-

timony taken on voir dire on the part of the jurors actually selected in order to convince the reviewing court that a reversal of the conviction is necessary under the Fourteenth Amendment. While it is true that "a juror who has formed an opinion cannot be impartial" Reynolds v. United States, 98 U.S. 145 (1898), this Court made it clear that jurors need not be "totally ignorant of the facts and issues involved" and may "have formed some impression or opinion as to the merits of the case. . .particularly. . .in criminal cases." Irvin v. Dowd, 366 U.S. 717, 722 (1961). Taking cognizance of "swift, widespread, and diverse methods of [modern] communication" and of the interest which an important criminal case is sure to arouse the Court said:

> To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective jurors impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in Court.
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> Irvin v. Dowd at 723

The State is aware that the adopting of such a rule does not "foreclose inquiry as to whether, in a given case, the application of that rule works a deprivation of the prisoner's life or liberty without due process of law." Lisenba v. People of California, 314 U.S. 219, 236 (1941).

In making this inquiry, however, the proper focus should be directed toward the six jurors who decided petitioner's fate. "While this does not mean that the experience of the court with the other veniremen questioned is wholly irrelevant, it does mean that the significance of that experience is primarily as a context in which to evaluate the examinations of, and the court's rulings on", those "who in fact served. See e.g., Irvin v. Dowd, 366 U.S. 717 (1961)." United States ex rel. Parson v. Anderson, 354 F.Supp. 1060, 1079 (D. Del. 1972). The following summary of the juror examination, in the instant case, will confirm juror impartiality and the absence of constitutional infirmity. See Beck v. Washington, 369 U.S. 541, 556 (1962).

> Mrs. Patricia Esher: She had heard of the crime, but "skipped over" reading the newspaper accounts; she felt she could give petitioner a fair trial. (TR. 480) In the jury room she had heard remarks both that petitioner was guilty and that he was innocent. Her word association with appellant's name was only that he worked on the beach and was a surfer. (TR. 492) Appellant's prior convictions (TR. 504), or failure to take the stand (TR. 501) would not alter her requirement of proof of the crime charged. (TR. 501) She adhered to the requirement of constitutional protections. (TR. 522) The following excerpt from

Mrs. Esher's voir dire best illustrates the degree to which she could be fair and impartial:

Q. [by defense counsel] Would the fact that he was a convicted murderer, or the fact that he was a convicted jewel thief tend to influence your verdict.

A. I would think so and I will tell you why. Because as the mother of three boys, once somebody has become involved in something, it is a very natural thing for people thereafter to immediately pick up one who has already been involved in something.

Q. I don't understand your analogy, ma'am.

A. A child who has been in trouble, everything that comes down the wire, immediately out of that, people single him out.

Q. Now, would the fact that he had been convicted tend to influence your verdict?

A. Not in this case.

Q. Not at all.

A. No.

(TR. 503-504)

James Collins: This juror stated he had not read anything that would prevent giving appellant a fair trial (TR. 618), and would presume him innocent (TR. 617). He vaguely remembered newspaper accounts several years before concerning the Whiskey Creek and Star of India ases. (TR. 624) In conversation on his job and in the jury room he learned of appellant's prior conviction for murder. (TR. 625) He stated none of those then in the jury room had formed an opinion of guilt on the present charge. (TR. 625-626) He did not own a television (TR. 626), had purposely avoided trying to read about the case (TR. 632) and did not believe in guilt by past background (TR. 627) or by association. (TR. 628)

David Edvabsky: This witness said he did not keep up on current events and had heard of Murph the Surf only recently. (TR. 855) He drew no association with appellant's name. (TR. 857) In the jury room he heard no expressions of opinions of guilt or innocence. (TR. 858) He did know of appellant's conviction for murder (TR. 863) but said it didn't affect his opinion. (TR. 859, 869, 862) This juror had no previous knowledge of defendant's conviction for jewelry theft.

In fact he subsequently gained this knowledge only thru the help of petitioner's counsel.

Q. [by defense counsel] The fact that he is a convicted murderer and jewel thief, that would influence your verdict?

A. I didn't know he was a convicted jewel thief.

Q. Oh, I see. I am sorry I put words in your mouth.

(TR. 863)

William Izzard: Subsequently, to be the foreman of the jury, he remembered an insanity plea by appellant in the Whiskey Creek case, but his memory was otherwise vague. (TR. 916) He did not remember the extent of appellant's conviction with the Star of India case. (TR. 917) He stated he would not be influenced in the present case by a previous conviction for murder. (TR. 926)

Louise Scoggins: Mrs. Scoggins remembered reading about the case but would presume the appellant innocent. (TR. 950). The fact that other people in the community had voiced an opinion of guilt would not be an influence on her verdict.

(TR. 963) While upon examination by defense counsel she stated she would be influenced by prior convictions, she ultimately stated that she held no opinion so fixed that it would not yield to the testimony of the case. (TR. 972)

Daniel Ferguson: The final witness to be selected stated he was "sickened" by opinions of guilt he had heard in the jury room and personally believed "in the system". (TR. 1045-1046). He knew of a conviction in the Whiskey Creek case and other crimes. (TR. 1048-1050). He was unfamiliar with the present case. (TR. 1054) The juror did not remember appellant's prior adjudication of insanity (TR. 1058) and emphasized that he would believe appellant innocent until proven guilty (TR. 1063-1064). He would be uninfluenced by anything happening previously. (TR. 1066, 1069)

At this point it is important to mention that the state trial judge originally deferred ruling on petitioner's motion for venue change pending in-camera voir dire examina-

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tion.[7] (TR. 14) It was in light of the above statements of impartiality that the trial judge denied petitioner's motion and the trial proceeded.

Petitioner carries a heavy burden. In order to prevail he must satisfy this court that the above responses were sufficient to raise a "presumption of partiality."

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[7]The trial judge's choice of in-camera juror inspection was in accord with the recommendation of the Reardon Committee on Fair Trial and Free Press; A.B.A. Standards Relating to Fair Trial and Free Press § 3.4(a) Method of Examination (Approved Draft, 1968), cited with approval by the Committee on the Operation of the Jury System, Judicial Conference of the United States, 45 F.R.D. 391, 413 (1968). In Irvin, this court expressed its concern that assurances of impartiality, while sincere, suffered because the "psychological impact requiring such a declaration before one's fellows is often its father" 366 U.S. at 728. The judicious choice of an in-camera, limitless voir dire eradicated this concern.

That this is the burden imposed by Irvin v. Dowd, 366 U.S. 717 (1961), is made clear by Beck v. Washington, 369 U.S. 541 (1962), in the majority opinion of Mr. Justice Clark, who had written the majority opinion in Irvin, supra. In Beck, supra, this Court was asked to reverse the conviction of national labor leader Dave Beck on the ground "that such a strong case of adverse publicity has been proved that any jury selected in Seattle at the time he was tried must be held to be presumptively biased and that the trial court's adverse findings on his motion for a change of venue was therefore error." Beck, 369 U.S. at 556. In holding against Beck, the Court said:

> We cannot say the pretrial publicity was so intensive and extensive or the examination of the entire panel revealed such prejudice that a court could not believe the answers of the jurors and would be compelled to find bias or preformed opinion as a matter of law. Beck, supra at 557.

The assurances of impartiality presented here do not support the indulgence of a presumption that such bias or preformed opinion existed.[8]

Petitioner also contends that members of the jury panel had been discussing the case and many had thereby formed a preconceived opinion of petitioner's guilt of the crime charged. (Brief of Petitioner at 5-6.) This latter point is extremely tenuous in that some prospective jurors stated the veniremen had been discussing petitioner's case while

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[8]Sufficient weight must be given to the sophistication of American juries and their willingness to do what they can perceive with the aid of effective judges and trial counsel to be their solemn duty. The experiences of skilled trial judges and lawyers teaches that jurors, with pointed questions on their voir dire, instructions from the bench and closing arguments by counsel, can be inspired to judge cases on the evidence tendered to them in court and nothing else. Former Attorney General John Mitchell himself, having been acquitted once by a jury in United States v. Mitchell and Stans, 73 Cr. 439 (S.D. N.Y. 1973) is in a position to testify to that. Waltz, "Juries and the Mass Media" Nation, Nov. 16, 1974. Indeed juror assertion of impartiality despite exposure to pretrial publicity has been upheld by this court on numerous occassions. Hopt v. Utah, 120 U.S. 430 (1887); Spies v. Illinois, 123 U.S. 131 (1887). Thiede v. Utah, 159 U.S. 510 (1895); Holt v. United States, 218 U.S. 245 (1910); Beck v. Washington, 369 U.S. 541 (1962).

others, also awaiting voir dire, were equally adamant that they heard no discussion. Mrs. Essie Schweid, for example, flatly stated that nobody in the juryroom discussed the case (TR. 664-665), and Mrs. Patricia Esher stated that she heard some veniremen say defendant was guilty while others held the opposite view. (TR. 489) The record cannot therefore be used to support the contention that a widespread preconception of guilt was harbored by the panel, even before their final selection. Rather, any prejudice alleged by petitioner must not be based on speculation but must be shown "as a demonstrable reality." United States ex rel. Darcy v. Hardy, 351 U.S. 454, 462 (1956). This burden has not been met here.

Assuming that mere knowledge of a defendant's previous conviction does not rise to constitutional error (See Point I), the mere showing of pretrial publicity, absent a demonstration of jury bias, will not warrant a reversal. Respondent is aware that this Court has shown itself extermely sensitive to "official intrusion into the privacy of the jury" Sheppard v. Maxwell, 384 U.S. 33 (1966), but here there was nothing that by the widest stretch can be so regarded. There is no doubt that the voir dire is not the entire measure of what may upset a verdict. "The press may at times so poison the surrounding atmosphere that it is impossible to have a fair trial at all and the guilty would go free; but it would be to the last degree undesirable to upset judgments, in all other respects just and reasonable, because of circumambent gossamers which not only the jurors said had no influence upon them, but which would

not have had substantial influence upon anyone who was capable of impartial judgment." United States v. Allied Stevedoring Corp., 241 F.2d 925, 935 (2nd Cir. 1957). Since the trial judge is in a better position than a reviewing court to evaluate the answer of a prospective juror on voir dire, the jurors' assertion of impartiality should not be overturned unless it clearly appears, through an affirmative showing by petitioner, that the judge has acted in abuse of his discretion. Reynolds v. United States, 98 U.S. 145 (1898); Stroud v. United States, 251 U.S. 15 (1919) reh. den. 251 U.S. 380; United States v. Shaffer, 291 F.2d 689 (7th Cir. 1961) cert den. 368 U.S. 914 (1961); United States v. Titus, 210 F.2d 210 (2nd Cir. 1954).[9]

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[9]The opinion of the Fifth Circuit spoke to this precise point in affirming the denial of a petitioner's writ of habeas corpus. "The district judge found the presence of some objective criteria, Beck v. Washington, 1962, 369 U.S. 541, 82 S.Ct. 955, 8 L.Ed.2d 98, in the nature and the time span of the pretrial publicity. We are in agreement with his determination that since the newspaper articles were largely factual rather than inflammatory, and since the dates of the news clippings and edited television news releases were almost entirely between December 15, 1967 and January 24, 1969 (only five articles being presented to the court bearing dates of the period of the jury selection and only one of those being a front-page article) the passage of time is a crucial factor in this case. We find no record basis upon which to disturb his finding that "each of the five jurors who had some knowledge of the facts of the Wofford robbery possessed only a vague recollection of the facts." 363 F.Supp at 1229. Murphy v. Florida, 495 F.2d 553 (5th Cir. 1974).

C. The Cases Upon Which Petitioner Relies For The Proposition That It Is Not Incumbent Upon Him To Demonstrate Actual Prejudice, Fall Within The Classification Of the Most Egregious Fact Patterns And Are Inapplicable To The Facts At Bar.

Petitioner has entirely failed to demonstrate the existence of actual prejudice on the part of the jury and the next inquiry should be directed to the necessity of such a showing. Traditionally this Court has required a criminal defendant to demonstrate that there was a nexus between the prejudicial publicity and his failure to receive a fair trial. See e.g., Beck v. Washington, 369 U.S. 541 (1962); Irvin v. Dowd, 366 U.S. 717 (1961); Stroble v. State of California, 343 U.S. 181 (1952). However, this Court has also determined that the conduct of the news media can in some instances be so inherently prejudicial and so persuasive in its effect that actual prejudice will be presumed. Such cases are Rideau v. Louisiana, 373 U.S. 723 (1963), where defendant's act of confessing was repeatedly televised in the community where he was tried; Estes v. Texas, 381 U.S. 532 (1965), where the courtroom was invaded by teams of television cameramen and photographers; and Sheppard v. Maxwell, 384 U.S. 333 (1966), discussed immediately hereafter. Petitioner apprently reads Sheppard as holding that where a community has been exposed to considerable pretrial publicity, it must be presumed that

his trial was not fair and impartial.[10] (Brief of Petitioner at 14-15.) Respondent respectfully urges that this is an erroneous interpretation. The following statement in the Court's opinion militates against such a contention.

> While we cannot say that Sheppard was denied due process by the judge's refusal to take precautions against the influence of pretrial publicity alone, the Court's later rulings must be considered against the setting in which the trial was held. 384 U.S. at 352-53.

The presumption of prejudice approach was justified in Sheppard not merely because of the inflammatory pretrial publicity but because of the "totality of circumstances" attending his trial. Sheppard, 384 U.S. at 352. Those circumstances were as follows:

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[10]Respondent does not agree with the petitioner's contention that Sheppard overruled Irvin v. Dowd, supra, sub silentio. As a matter of fact, Irvin is cited by the majority in Sheppard, apparently with approval. 384 U.S. at 351.

1) A reenactment of the events of the fatal evening by Sheppard with newsmen present, but no attorney.

2) Newspaper stories about his alleged unwillingness to take a lie detector test.

3) An inquest, staged in the high school gymnasium with reporters and television cameras present. There was a live broadcast of the inquest on radio.

4) Publication of the names and addresses of all the veniremen in the local newspapers.

5) A special table for the approximately 20 reporters present which was set up at trial; testimony and pictures appeared in the press each day of the trial.

6) Damaging "testimony" by police and relatives which was never introduced at the trial but which appeared in local newspapers.

7) Permission for jurors to make daily unmonitored phone calls to their homes while sequestered at the trial.

The sum total of events at that trial produced an ultimate reversal. There is no possible comparison between that trial

or publicity, and the trial and publicity related to Jack Roland Murphy in the instant cause. This Court's task is one of analyzing all of the circumstances in petitioner's case to determine whether they were so egregious and inherently harmful as to obviate the necessity of showing actual prejudice. The Sheppard decision is perhaps the only yardstick. In Sheppard the signifcant circumstances included not only the pretrial activity of the newsmen but also their conduct and its effect during the trial. This phase of petitioner's case must also be examined.

Petitioner relies on a collection of newspaper clippings submitted as exhibits in the lower courts. (TR. 2406-2569) The dates on the great majority of these newspaper clippings show them to have been published between December 15, 1967 and January 24, 1969. Jury selection in the case began on July 27, 1970, more than eighteen months later. Only five (5) articles, have been presented by the petitioner bearing dates of the period of jury selection and of these only one was sufficiently newsworthy to warrant coverage on the front page of the paper's second section. The remaining articles appeared on the paper's back pages. While the time period between the publicity and petitioner's trial is certainly not a complete answer to the pretrial-publicity problem, delay has been recognized as having a significant ameliorating effect. See e.g., Beck v. Washington, 369 U.S. 541 (1962); United States v. Bowe, 360 F.2d 1 (2nd Cir. 1966); Corbett v. Patterson, 272 F.Supp. 602 (D. Colorado, 1967).

In United States ex rel. Rosenberg v. Mancusi, 445 F.2d 613 (2nd Cir. 1971), the Second Circuit reviewed a state prisoner's appeal from the denial of his habeas corpus petition on pretrial publicity grounds. In affirming, the court relied heavily on the time span between the initial flurry of news at the time of the crime and defendant's trial nine months later. In its consideration of this Court's prior decisions on pretrial publicity the Second Circuit noted that:

> The opinions in Sheppard and Estes are, of course, very instructive on the dangers of adverse publicity, although both decisions turned on the circus atmosphere created by the publicity during the respective trials, a factor which is decidedly absent here. at 617

The rationale for giving consideration to this factor is that notwithstanding any prejudice originally engendered upon the release of the publicity, with the passage of time this prejudice would be greatly diminished or dulled. The time factor was the main ingredient causing reversal by this Court in Rideau (trial two weeks after filmed confession shown on television), Estes (television transmission during the trial proceedings) and Sheppard (publicity, newsmen inside courtroom bar and and communication during the trial), and greatly contributed to a finding of prejudice in those cases.

Unlike the news coverage of the Sheppard case, the newspaper stories carried by the Miami Herald, Miami News, Miami Beach Sun and Sun-Sentinel were in no sense acusatory or vindictive. They were generally objective and straightforward, although the amount of factual data they imparted was unusually great.

In Sheppard the news media frequently carried editorials in which the prosecuting authorities were urged to give Sheppard the "third degree" and assailed for their "fumbling" of the case. The editorials unquestionably bore the hallmark of accusation.

The following are some of the headlines which appeared in the Cleveland newspapers prior to the Sheppard trial: "Quit Stalling and Bring Him In"; "Sam Declined July 4 Lie Test"; "Says Dr. Sam Talked Divorce"; "Testified Sam Changed Stories"; "Charges Sam Faked Injuries"; "Marilyn called Sam a Jekyll-Hyde"; "Kerr Called Dr. Sam a Bare Faced Liar"; "Doctor Re-enacts Story of Murder; Rejects Lie Test"; "But Every Moment of Fumbling is Helping a Murder Escape"; "Sheppard Set For New Quiz"; "Getting Away with Murder; An Editorial"; "Why No Inquest? Do It Now, Dr. Gerber"; "Get That Killer"; "Why Don't Police Quiz Top Suspect; An Editorial"; "Why Isn't Sam Sheppard In Jail?"; "Who Will Speak for Marilyn"; "Dr. Sam Faces Quiz at Trial on Marilyn's 'Fear of Him'"; "Police Assert Couple Had Violent Rows". See the various opinions on the Sheppard case in 384 U.S. 333 (1966); 346 F.2d 707 (6th Cir. 1965), 231 F.Supp. 37 (S.D. Ohio 1964); State v. Sheppard, 165 Ohio St. 293, 135 N.E.2d 340 (1956), and 100 Ohio App. 345, 128 N.E.2d 471 (1955).

The editorial campaign against Sheppard was even carried on by cartoons. See 231 F.Supp. at 52-53. The approach of one newspaper, the Cleveland Press, was described by the federal district court:

> For some reason that paper took upon itself the role of accuser, judge and jury. The journalistic value of its front page editorials, the screaming, slanted headlines and the nonobjective reporting was nil, but they were calculated to inflame the public. 231 F.Supp at 63.

A comparison to the case sub judice shows a sharp contrast to the "circus-like" atmosphere in Sheppard.

Not only was the pretrial publicity in petitioner's case far less prejudicial and vindictive than in Sheppard, but the atmosphere at trial was calm and serene in comparison with the bedlam which reigned at the Sheppard trial. It therefore can be concluded that the circumstances attending the investigation, arrest, detention and trial of petitioner falls far short of the "totality of aggravating circumstances" in Sheppard. The distinctions in petitioner's case which are most salient include the delay between most of the pretrial publicity and the trial, the lack of vindictiveness of the publicity, absence of official comment regarding the evidence, the in-camera voir dire and the orderliness of the trial proceedings.

Petitioner next relies on Rideau v. Louisiana, 373 U.S. 723 (1963) and Estes

v. Texas, 381 U.S. 532 (1965) to support his contention that there has been adopted a new standard for reviewing pretrial publicity cases. In Rideau, this court found that the minimal constitutional standards of due process were lacking when the accused was forced to trial before a jury where three of the veniremen had seen and heard Rideau's televised confession to the crime while an additional two members of the jury were deputies of the police department responsible for the confession. Because these extraordinary facts were so charged with the potential for prejudice, this Court found it unnecessary to reach the issue of whether petitioner established a nexus between the televised confession and prejudice of the trial jury. In Estes, holding the televising and broadcasting of defendant's trial inherently deprived him of his right under the Fourteenth Amendment to due process of law, this Court again distinguished between those cases involving inherently prejudicial publicity requiring no showing of actual prejudice or nexus between community and jury sentiment, and the basically different class of cases arising from less grievous threats to the fairness of the trial.

The holding in Estes was not an innovation but rather a continuation of that principle expressed in Tumey v. Ohio, 273 U.S. 510 (1927) that:

> . . .the requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could

> carry it on without danger of injustice. Every procedure which would offer a possible temptation to the average man. . .to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law. At 532. (Emphasis supplied.)

Estes, supra, 381 U.S. at 543.

Nor was it a recession from Stroble v. California, 343 U.S. 181 (1952), and Irvin v. Dowd, supra, but a necessary extrapolation thereof guiding those cases encompassing the most extreme violations. By logic as well as precedent the totality of the circumstances test espoused by Irvin v. Dowd, supra, requiring the federal habeas corpus court to assume the ". . .duty to make an independent evaluation of the circumstances" Sheppard v. Maxwell, 384 U.S. 333 (1966) is an absolute necessity for fairly resolving those challenges based on pretrial publicity that possibly though not clearly may have affected the fact finding process of the trial. It must be deemed controlling of cases such as the one at bar in which the trial itself is not extraordinary and the community's climate of opinion as to the defendant is not inherently suspect, raising no probability of unfairness.

Appellant's reliance on United States ex rel. Bloeth v. Denno, 313 F.2d 364 (2d Cir. 1963), as a parallel to the instant case, is unfounded. There a series of

killings occurred in a small county, thoroughly alarming its residents and leading to inflammatory newspaper reports of a "mad killer". Much of this publicity was fostered by the prosecution. Local interest in the trial was intense due to the general fear that a finding of insanity would free the mad killer to strike again.

There is no similarity between this general fear and apprehension of the small community in Bloeth, and the reaction in Dade County at the time of appellant's trial. As in Beck v. Washington, supra, the complained of publicity was in fact diminishing prior to the beginning of the petitioner's trial. There is no evidence of such a fervor in the community as to result in widespread hostility, as was the case in Pamplin v. Mason, 364 F.2d 1 (5th Cir. 1966), where the prejudice was racial. In Dade County, by contrast, when one juror was asked his impression of "Murph the Surf" he responded "Well, more or less as a character that the Miami Herald created, a fantasy. I can't connect him with a live human being, a person." (TR. 1048)

In sum this court is guided by the teaching of Irvin v. Dowd, supra and Beck v. Washington, supra. This lesson seems to be that this Court will not reverse convictions notwithstanding extensive pretrial publicity, unless the nature of the publicity is to arouse such rage and revulsion as would create bitterness and deep seated prejudice, and such prejudice is reflected and confirmed by expressions on the part of the overwhelming majority

of the persons questioned on voir dire, as well as by a substantial proportion of the jurors actually impaneled. In Irvin, prejudice was clearly reflected where eight of the twelve jurors stated on voir dire their belief in defendant's guilt. In addition, Irvin's oral confession to authorities appeared in newspapers the day before the trial commenced. In the instant case, petitioner has alleged no prejudice which is analogous to those cases where this Court has been compelled to order a new trial. Since the record in this case supports the existence of impartiality and a courtroom free of "identifiable prejudice" Estes, supra, petitioner's claim of judicial error must be denied.

D. Assuming Arguendo, That The Trial Judge Erred In Denying Petitioner's Motion For Change Of Venue, Such Error, In Light Of the Overwhelming Evidence Was Harmless Beyond A Reasonable Doubt.

The evidence presented by the State at trial was overwhelming. The petitioner was apprehended at the scene of the crime immediately after the police interrupted that crime in process. (TR. 1828)

The State's first witness was Officer Ducharme of the Miami Beach Police Department. He responded to an alarm at the home of Olive Wofford, a wealthy Beach

Socialite. Upon his arrival, Ducharme saw a man in blue running from the Wofford house. At trial he identified that man as the petitioner. (TR. 1765)

One of the victims testified that a man in a blue jacket broke in, held her at gun point and threatened physical violence unless she cooperated. (TR. 1931-46) The officers who arrived on the scene identified the man in the blue jacket as petitioner (1765, 1824). In addition testimony at trial revealed that petitioner attempted to escape police by diving through the glass door at the rear of the Wofford home. (TR. 1828)

Upon arrest petitioner was cut and bleeding from such gashes about his chin and neck that officers felt he needed immediate medical treatment. Petitioner shortly thereafter was taken directly to a local hospital where glass fragments were removed from his neck. (TR. 1830) At trial a police chemist compared these fragments with the glass door at the Wofford home and testified that they matched. (TR. 1873) Next, the supervisor of the police lab was called to testify about a comparison he made with the blood found on the glass door and a sample taken from petitioner. His testimony was that the comparison showed that the samples matched and the blood on the door was that of petitioner. (TR. 1868) The lab technician next testified that the latents on the glass door positively matched those of defendant (TR. 1886-1888). Finally, a comparison of the projectiles take from the wall in the Wofford home were compared with petitioner's weapon

and the testimony showed a good possibility that the bullets in fact came from petitioner's gun. (TR. 1987)

This Court held in Chapman v. California, 386 U.S. 18 (1966), that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." Id. at 24. Although "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error" (id. at 23), not all "trial errors which violate the Constituiton automatically call for reversal." Ibid

The mere finding of pretrial publicity should not automatically require reversal of the ensuing criminal conviction. In some cases the evidence of guilt is so overwhelming, and the prejudicial effect of the publicity is so insignificant by comparison, that it is clear beyond a reasonable doubt that failure to grant a change of venue was harmless error. Such a proposition is the logical extension of this Court's decision in Schneble v. Florida, 405 U.S. 427 (1972); Harrington v. California, 395 U.S. 250 (1969); and Chapman supra. The remarks of Mr. Justice Rehnquist in Schenble bear particular elevance to the case at bar:

> Judicious application of the harmless-error rule does not require that we indulge assumptions of irrational jury behavior when a perfectly rational explanation for the jury's verdict, completely consistent with the judge's instructions, stares us in the face. Schenble, 405 U.S. at 431-32.

Emphirical studies support the extrapolation of the "harmless error" rule to the case at bar.[11]

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[11]An analysis of the following data presents a "rational explanation" for the jury verdict in the instant case.

Drs. Stanley Sue and Ronald E. Smith, of the University of Washington, recently tested the effects of inadmissible evidence and pretrial publicity on subjects who assumed roles as jurors. They gave 105 university students a description of a grocery store robbery in which the owner and his five-year old granddaughter were killed. The group was also given an account of the suspect's apprehension by the police and a summary of the evidence presented by the prosecution and defense at the ensuing trial. Half of the students were given cases with strong evidence against the defendant, the other half read weak cases for the prosecution. To test the effects that inadmissible evidence had on individual verdicts, some persons in each group received additional incriminating evidence that was declared either admissible or inadmissible. The control groups received no additional information. When the three subgroups were compared no significant difference was found among the groups in the percentage of guilty verdicts, where the evidence was strong. The study concluded: "It appears that the biasing effect of inadmis- decision. The controversial evidence then becomes quite salient in the juror's mind. On the other hand, when there is already strong evidence against the defendant, the inadmissible evidence seems to have little effect on a juror's verdict." Smith & Smith, "Psychology Today", May 1974 p. 86, 90.

Respondent submits that the overwhelming evidence presented at trial against the defendant supports a rational explanation for the guilty verdict. "Reasonable minds of an average jury" would not have found the State's case significantly less persuasive had they not been exposed to newspaper coverage. As Mr. Justice Douglas concluded in Harrington v. California, 395 U.S. 250 (1969):

> Our decision is based on the evidence in the record. The case against Harrington was not woven from circumstantial evidence. It is so overwhelming that unless we can say that no violation of Bruton can constitute harmless error, we must leave this state conviction undisturbed. Id. at 254.

A substitution of Murphy and Sheppard respectively, in the above quotation would aptly describe the condition of the present case.

CONCLUSION

The respondent respectfully submits that the petitioner has failed to demonstrate that any federal constitutional rights have been violated. In the absence of a clear showing that the Florida practice employed is violative of the federal Constitution, this Court is under no legal or moral obligation to reverse the decision before this Court.

The respondent has, without question, shown that the alleged constitutional abridgements are instead appropriate rulings presaged by former opinions of this Court and by the well-reasoned opinions of the lower courts.

The State of Florida would respectfully urge that the decision of the Court of Appeals be affirmed.

Respectfully submitted,

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